United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7701

To be argued by
JACK DASHOSH

In The

United States Court of Appeals

For The Second Circuit

ESTHER JA[illegible]OBY,

Plaintiff-Appellee-Appellant,

vs.

ALFRED B. AVERELL, CHARLES M. EDWARDS, JR., DONALD B. GOMES, ALVIN C. MARTIN, SOLOMON ROGOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FR[illegible]DERICK ZISSU and VORNADO, INC.,

Defendants-Appellants-Appellees.

On Appeal from Final Order and Judgment of the United States District Court for the Southern District of New York, Sat Below, Lawrence W. Pierce, U.S.D.J.

BRIEF FOR DEFENDANTS-APPELLANTS-APPELLEES

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STATEMENT

The defendant corporation, Vornado, Inc. ("Vornado") appeals from a final order and judgment of the United States District Court, Southern District of New York (Pierce, J.) which awarded plaintiff attorney fees of $10,000.00 plus disbursements of $211.44 for

services rendered in this stockholder derivative action. (186a - 187a*)

Plaintiff's basic argument is that the institution of this suit had a therapuetic value to the defendants. It is defendant's position, however, that inasmuch as the determination by the District Court on the substantive issues turned on the narrow "contractual" construction of Vornado's Stock Option Plan, and since the defendants unquestionably acted in good faith with the intention of effectuating the amended stock option rights for purposes of benefiting the defendant corporation and complying with the technical provisions of the Internal Revenue Code, there can be no finding of therapuetic benefit. This stockholder's derivative suit which rested solely on the construction of a contract (Stock Option Plan) can have no preventive therapuetic benefit. It cannot realistically prevent similar transgressions of language in corporate documents in the future, and is not the kind of substantial value required for the granting of attorneys fees. Accordingly, no award of fees and expenses to plaintiff is justified.

*References are to pages in the "Appendix"

FACTS

On April 16, 1968, Vornado's Board of Directors adopted a "qualified" Stock Option Plan ("Plan"), the purposes of which were:

> "...to provide an incentive to key employees of Vornado, Inc. and its subsidiaries ("Company"), including officers and directors who are employees, to contribute to the success of the Company by purchasing a proprietary interest in the Company, and to offer an additional inducement in obtaining and retaining the services of key personnel. Purchases shall be made in accordance with "qualified stock options" issued pursuant to the Internal Revenue Code of 1954, as amended ("Code")." (19a)

The shareholders of Vornado approved the Plan on June 4, 1968. The Plan directed the Board of Directors to appoint a stock option committee consisting of not less than three nor more than five of the directors of Vornado to administer the Plan. (20a) The Plan authorized the corporation to grant options to key employees to purchase in the aggregate not more than 297,000 shares of the common stock of the corporation. Paragraph "2" of the Plan provided in part: ". . .Any shares subject to an option which for any reason expires or is terminated unexercised as to such shares, shall again become available for options under the Plan".

Paragraph "8" of the Plan provided:

> "Prior Outstanding Options. Any option granted to an optionee shall not be exercisable while any options previously granted to him to purchase

Common Stock at a higher price under this or any other option plan of the Company remain outstanding within the meaning of Section 422 (c) (2) of the Code."

Pursuant to the Plan, the committee, during the period from July 1968 to January 15, 1970 granted approximately 363 officers and employees of Vornado five-year options to purchase an aggregate of 282,500 shares of Vornado's common stock at a price equal to the market value of the shares on the date of the grant. The prices ranged from $23.00 to $25.07 per share.(95a - 96a)

Towards the end of the year 1969 and early 1970, the market price of Vornado's common stock began to decline [as did the stock of many other publicly held companies at that time]. From December 20th to 31st, 1969, Vornado stock traded at from $15-5/8 to $18-1/4 per share. Between January 1st and January 16th, 1970, the price of the stock ranged from $13-3/4 to $17-1/8 per share. It is undisputed that in mid-January, 1970, due to the overall market decline Vornado's then outstanding stock options had for all practical purposes lost their value as a means of enhancing the incentive of its officers and employees, as contemplated by the 1968 Plan. Furthermore, at the time there was considerable talk in the business community that the decline created a danger that key executives would be tempted to move from one company to another in order to obtain options that were more in line with market conditions.

(96a - 97a) It was these factors that governed the committee's adoption on January 16, 1970 of a resolution which was thereafter unanimously approved by Vornado's Board of Directors authorizing the corporation to modify the option contracts granted pursuant to the Plan so as to provide that:

(a) the option can be exercised at a price equal to the fair market value of the Vornado stock on January 16, 1970 [$14.69 per share]; and

(b) the modified option rights were not exercisable prior to the expiration of the five-year term under the options as originally granted; and

(c) the number of shares purchasable under the modified (amended) option rights must be reduced by the number of shares purchased by any optionee under the original option plan.(97a)

Since the first of the original option rights granted had a five-year term which would not expire prior to July, 1973, the amended option rights could not be exercisable until that time. Thus, the amended option rights had an effective life during which they were actually exercisable of eighteen (18) months, i.e., from July 1973 to approximately January 15, 1975. (97a)

Immediately following the adoption and ratification of the resolution authorizing the amended options, Vornado entered into agreements with each of its

employees then holding option rights implementing the resolution and modifying the outstanding option agreement in accordance therewith. Stockholder approval of the January 16, 1970 resolution was not sought or obtained, however, notification of the resolution was sent to the Vornado shareholders in its proxy statements respecting the annual shareholders meetings for the years 1970, 1971 and 1972. No objection was made by the plaintiff, or anyone else to the January 16, 1970 resolution until the institution of this action on December 29, 1972. (98a)

Plaintiff, the owner of 50 shares of Vornado common stock, in a twenty-one paragraph complaint sets forth causes of action alleging violations of Sections 10 (b) and 14 of the Securities and Exchange Act of 1934, and the common law claim of breach of a fiduciary duty by the individual defendants, officers of the corporate defendant, in connection with the granting on January 16, 1970 by the corporation of amended option rights. (93a)

The objective of Vornado immediately following the institution of suit was to bring about its immediate resolution in order to clarify the status of the option rights for its key employees and thus avoid any disruption and diminution in morale. The corporation was aware, at that time of the pendency of the case of Waltzer v. Billera (Civ. No. 72-2052) before Judge Ryan and of it's

factual similarity to the instant action. Accordingly, a request subsequently was made that this action be transferred to Judge Ryan with a view toward early disposition of both suits by the same Court. In May of 1973, prior to any determination in this case, Judge Ryan decided Waltzer. In it he granted summary judgment in favor of the defendants on the claims predicated upon alleged violations of Sections 10 (b) and 14 S.E.A. and granted summary judgment to the plaintiff on the single narrow ground that the amendments to the options granted under the basic Plan of the corporation (U.S. Industries, Inc.) were not countenanced by that stock option plan and were void. (99a - 100a)

In the light of the decision of Judge Ryan in Waltzer, Vornado sought to take immediate steps to effectuate a determination of the issues in this suit, on the same basis as in Waltzer. Clearly it was more beneficial for Vornado to immediately remove any existing doubt or cloud respecting option rights even if it meant an adverse determination in this lawsuit. Since none of the amended option rights had been exercised and the entire question of the validity of these rights was essentially academic, Vornado concluded that it was better to have the issue determined, even adversely, rather than to prolong the unsettled and demoralizing status of the stock option rights granted to key employees.

(100a)

Accordingly, at the first pre-trial hearing before Judge Pierce in this action, the Court was made aware of Vornado's position. A stipulation of facts signed by the attorneys for the respective parties was submitted to the Court on or about November 12, 1973. (101a) Vornado's willingness to adopt Judge Ryan's decision was made clear to both the Court and to plaintiff's counsel by letter of December 21, 1973 addressed to Judge Pierce. (101a - 102a) In it defendants' counsel underscored the benefit to the corporation of a quick disposition:

> ". . .The institution of this law suit has worked an uncertainty as to the status of the stock options granted to the many key employees of the corporation and has affected their morale and that of its shareholders. It is, accordingly, of the greatest importance to the corporation, and we respectfully urge, that the matter and the uncertainties be resolved so that the corporation may act in the light of the Court's decision and provide its key employees with solid option rights free of any uncertainties.
>
> Because of these exigencies, the corporation is prepared to accept a decision by your Honor based upon the ruling in Waltzer v. Billera (USI) C.C.H. Fed. Sec. L. Rep. ¶ 94,011, S.D.N.Y. May 23, 1972, per Judge Ryan, that the act of the corporation in January, 1970 was a technical violation of the corporation's 1968 stock option Plan and therefore, technically, in violation of the State law of Delaware.
>
> . . .Moreover, we stress that the defendant's statement as to their willingness to accept such a decision is not made with any intent to waive any of their rights concerning the question of

> counsel fees or other litigation expenses being awarded to the plaintiff herein. It is our position that plaintiff is not entitled under all of the circumstances herein to any of such fees and expenses and we request that this question be referred to a referee or magistrate for determination after the Court's determination of the substance of this matter." (154a - 155a)

On January 16, 1974, Judge Pierce handed down his decision in Waltzer. In it he commented that:

> "This case [Jacoby] is on all fours with the recent decision of Judge Sylvester J. Ryan of this district in Waltzer v. Billera . . . I find that opinion persuasive and will adopt its reasonings here." (42a)

The Court then went on to find that there was no evidence that defendant's activities in amending the 1968 Plan violated Section 10 (b) of the Securities and Exchange Act or Rule 10 b-5 promulgated thereunder. Nor did defendant violate §14 of the Act. "In short", said the Court, "there was no false or misleading statement in the proxy". The Court concluded, however, that consecutive or tandem options were not contemplated by the 1968 Plan and therefore the 1970 amendment and the options granted pursuant to it were void. (48a, 49a, 50a) Accordingly, judgment was entered on January 30, 1974 directing the defendants to procure the cancellation of the stock options granted and to account to Vornado for damages, if any. (52a)

Thereafter, defendants' accounting to the Court consisted almost entirely of acknowledgements,

alike in form and substance, from each of the optionees holding amended option rights which had not previously been cancelled, cancelling those rights. In sum, the amended option rights were granted affecting 329,650 shares of Vornado common stock. Prior to the Court's decision on January 17, 1974, amended option rights affecting 103,850 shares of stock were terminated by virtue of termination of employment or death. The balance of the amended option rights affecting 168,000 shares of common stock were cancelled by virtue of agreement of the optionees.

Thus, the accounting showed that:

(1) From and including July, 1973 when the amended stock option rights first became exercisable to the date of cancellation, the high market price of Vornado stock for each of the months during this period never exceeded $9 1/2 per share. The average monthly high for the entire period was approximately $7 1/8 per share. [The amended option price was $14.96 per share.]

(2) None of the amended option rights were exercised at any time.

(3) No stock of Vornado was acquired pursuant to those rights.

(4) No monetary transactions were effectuated respecting the amended option rights.

(5) Vornado or its stockholders suffered no

loss or damage. (106a)

Plaintiff's application for attorney fees was referred by Judge Pierce to Magistrate Goettel for his report and recommendation. On June 25, 1975, the Magistrate submitted his report recommending legal fees in the amount of $10,000.00 plus disbursements of $211.44 be paid to plaintiff. (156a - 165a) In an Opinion and Order dated November 19, 1975, Judge Pierce adopted Magistrate Goettel's recommendation, finding that though the harm averted by plaintiff's action was speculative and the suit eventually proved unnecessary, it had an actual value at the time it was commenced and there was some therapeutic value in voiding options not authorized by the shareholders. (179a - 185a) Plaintiff and defendants both filed appeals from the District Court's order and judgment.

POINT I

ATTORNEYS FEES SHOULD BE DENIED BECAUSE THE CORPORATE DEFENDANT HAS NOT RECEIVED A SUBSTANTIAL BENEFIT, NOR HAVE THE INDIVIDUAL DEFENDANTS BEEN ENRICHED AS A RESULT OF PLAINTIFF'S ACTION

It is a prime requisite for the recovery of counsel fees and expenses in connection with a stockholders derivative suit that plaintiff show that the action produced a substantial benefit to the defendant corporation.

Mills, et al v. Electric Auto-Life Co., et al, 396 U.S. 375 (1970);

Bosch v. Meeker Co-op Light & Power Ass'n 257 Minn. 362, 101 N.W. 2d 423 (1960);

Schechtman v. Wolfson, et al, 244 F. 2d 537 (2d Cir. 1957);

Waltzer v. Billera, Fed. Sec. L. Rep. ¶ 94,011 (S.D.N.Y. 1973);

Wechsler v. Southeastern Properties, Inc. 63 F.R.D. 13 (S.D.N.Y. 1974)

The facts recited above show conclusively that:

(a) The accounting submitted by the defendants pursuant to the judgment and order of Judge Pierce dated January 16, 1974 was a full and complete demonstration that each and every one of the amended option rights still extant at the time was cancelled by agreement of each of the optionees holding such rights.

(b) Defendant corporation has received no substantial benefit - in fact, no benefit whatsoever, whether pecuniary or otherwise as a result of the institution of the shareholders derivative suit by the plaintiff. Absent the institution of this action, none of the amended option rights would have been exercised during the eighteen (18) month period that they were viable and exercisable, to wit, July 1973 through January 15, 1975. The market price of the Vornado stock never equalled or exceeded the amended option price of $14.69 per share; in fact, during this period, it never exceeded $9-1/2 per share. This situation, realistically and effectively, precluded the exercise of any of the amended rights. Had this suit not been brought, the fact is that none of the amended rights would have been exercised and the defendant corporation, accordingly, could not have suffered any harm or prejudice, nor for that matter, could any of the individual defendants have been enriched.

Even the claim by plaintiff of the mere possibility of a benefit that may have existed at the time of the institution of this suit in December of 1972 required, for fruition, a confluence of market circumstances as to render such a claim purely speculative and uncertain in nature. (i.e. a sufficient rise in the market price of Vornado stock within the period that the amended rights were exercisable but not in advance thereof so as to permit optionees to acquire stock under the untainted original option rights.)

Waltzer v. Billera, supra, is a case which both the District Court and the parties agree is on all fours with the facts and issues in the instant case. There, plaintiff's application for attorney fees and

expenses was denied by Judge Ryan:

> ". . .principally because it does not appear from the accounting which has been filed by the defendants pursuant to the judgment of this Court that the corporate defendant has been substantially benefited as a result of plaintiff's counsel's efforts or that the individual defendants were enriched as a result of the acts complained of." (83a)

Further, after discussing its finding that the Board of Directors of U. S. Industries had breached the terms of a qualified stock option plan by permitting the appointed committee to amend option rights, the Court in Walzer stated that the violation was:

> ". . .a technical violation, at its worst",

and

> ". . .that the law was not free of doubt and I certified the matter for intermediate appeal." * (83a)

The Court noted that the judgment therein was entered on consent and that the accounting filed by the defendants pursuant to the judgment demonstrated that all of the amended option rights which were the subject of plaintiff's attack were cancelled by death or departure of the optionees, exercise of the original option rights, or by agreement, except that:

> "(d) 3,473 shares representing rights held by 7 holders have been cancelled by USI, who will not

* No appeal from the substantive decision was ever taken by either party.

permit the options to be exercised; 2/

(e) 600 shares were purchased by one optionee - not an officer or director defendant - prior to my decision at the price of $12 per share when the market was $17.6875 at a profit to the optionee of about $3,000.00." (84a)

The Court, in its opinion, then went on to state:

"While it may seem inequitable to deny counsel fees in view of the services performed, counsel was well aware that the outcome of the case was highly doubtful. He acknowledges that many corporations had acted in similar fashion, that he took the case on a contingency at the behest of one stockholder whose holdings are undisclosed, and that there may be difficulty in determining the precise amount of the benfits derived by USI. Certainly, no accountant's services were needed to determine whether as a matter of law the defendant could amend its option plan, the only theory on which plaintiff prevailed. Assuming that these services were necessary to evaluate the securities violations, these claims were dismissed.

While it is not necessary to show the creation of a cash fund as a result of counsel's efforts from which the fee might be paid, it is absolutely necessary to find that some substantial benefit has been conferred on the corporate defendant that is paying the fee. 'A substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interest of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest.' Bosch v. Meeker Cooperative Light & Power Assn., 257 Minn. 362, quoted by the Supreme Court in Mills, et al, v. Electric Auto-Life Co., et al, 396 U.S. 375, at page 396. Wechsler v. Southeastern Properties, Inc. #74,1596, 74-1655, C.A. 2, November 4, 1974.

The invalidation of the amendments to the stock option agreement by this court's decision, while

> perhaps salutary as a deterrent to similar future actions, has resulted in a supposed benefit of so uncertain a nature as to preclude compensation by the corporation. Schectman v. Wolfson, 244 F. 2d 537 (C.A. 2, 1957).
>
> The motion is denied; so ordered."
>
> [Emphasis ours.] (84a)

The facts and circumstances present here demand, even more forcefully than in Waltzer, the denial of plaintiff's application for fees and expenses.

Firstly, the right to and amount of attorneys' fees in Waltzer was agreed to by the attorneys for the defendant corporation. Here, not only the amount, but plaintiff's right to attorneys' fees and expenses have been consistently contested.

Secondly, in Waltzer, some holders of amended option rights did not acknowledge cancellation thereof, and another exercised the amended rights which were subject to the plaintiff's attack. Here, all optionees holding outstanding amended rights at the time of Judge Pierce's decision on the substantive issues agreed to the cancellation of those rights. More importantly, none of the holders of the Vornado amended rights at any time exercised them. Accordingly, in Waltzer there was an actual monetary transaction and pecuniary benefit to at least one of the optionees, resulting in the possible claim of loss thereby by U. S. Industries, Inc. Here, there are no damages or losses to Vornado, and no benefit

to any of the optionees holding amended rights, nor could any be claimed.

The case of Mills, et al v. Electric Auto-Lite Co., et al (supra) cited in plaintiff's brief in support of its application is in fact clear authority for the propositions that an absolute essential to the granting of attorneys' fees in a derivative action is that that action be productive of a substantial benefit to the defendant corporation, i.e., that the action prevents or cures a substantial harm or prejudice to that corporation. In Mills, the plaintiff shareholders brought an action which was ultimately successful in determining that proxy statements issued by the defendant corporation in connection with a merger were materially misleading and contained material omissions of fact. The U. S. Supreme Court determined that the casual connection between the misleading proxy statements and the harm or prejudice to the corporation had been established by virtue of the finding of the trial court of materiality in the omission from the proxy statement, but that at bottom, the finding of causality and harm or prejudice was essential to the success of the lawsuit and the claim for legal fees and expenses. The Court goes on to state that legal fees and expenses may be awarded notwithstanding that the suit has not yet produced and may never produce a monetary recovery from which the fees could be paid, a proposition which defendants do not

dispute. Nevertheless, the pivotal point of Mills is the finding by the trial Court that in fact the wrongdoing--the proxy omissions--were material and because they were material, they were causally related to the resultant vote. In short, the core of the decision in Mills, is that the wrongdoing had a real effect--it produced a harm and prejudiced the defendant corporation.

The Mills case, therefore, not only fails to support plaintiff's argument but is supportive of defendants' position that the plaintiff should not recover legal fees and expenses inasmuch as no substantial benefit to the defendant corporation has been or could be shown.

This reading of Mills is clear from the decision itself and is fortified by the citation in that case of Bosch v. Meeker Co-op Light & Power Ass'n (supra). Bosch was a derivative suit which resulted in a determination that an election of directors and of a proposed amendment to the corporate by-laws was illegal. There too, no monetary fund was established as a result of the suit. However, it is clear from the decision in Bosch and its remand to the trial court that the central issue in determining the propriety of an award of legal fees was whether plaintiff's suit had produced a substantial benefit to the defendant corporation.

absent the prevention of harm or prejudice to the corporation, there can be no substantive benefit which would authorize the awarding of attorneys' fees and expenses. The language of the Court in Bosch is clear in this respect:

> ". . .Where an action by a stockholder results in a substantial benefit to a corporation he should recover his costs and expenses. As to what is a "substantial benefit" is for the trial court to determine in the light of the facts and circumstances of the particular case without attempting in any way to define the term or circumscribe its application, we would say that a substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest." [At pgs. 426-427; emphasis ours]

Moreover, the mere finding of wrongdoing or unreasonable or arbitrary acts do not in and of themselves give rise to the finding of the requisite substantial benefit to the corporation. Witness, the Court's statement at page 427 as follows:

> ". . .While the findings characterize certain acts of the managing officers of the corporation as being "unreasonable and arbitrary", they do not cover the issue as to whether or not the judgment results in a substantial benefit to the corporation or its stockholders. We are accordingly remanding the case to the trial court for further findings on that issue . . ." [emphasis ours]

The proposition that the requisite production of a substantial benefit to the defendant corporation

necessary to establishing that a stockholder's derivative suit has corrected or prevented actual harm or prejudice to the corporation is crystalized in the earlier case of Schechtman v. Wolfson (supra), cited in both Mills and Bosch.

In Schechtman, plaintiff's application for fees and expenses in connection with a derivative actic brought to enjoin certain individual defendants from serving as directors of both the defendant corporation, and another, were denied by the District Court and such denial was a[illegible]med by the Court of Appeals. In doing o, the Court of Appeals stated:

> ". . .We agreed that the plaintiff has failed to prove sufficient benefit to the corporation to entitle his attorney to reimbursement from the defendants . .The modern equity practice is to allow counsel fees to successful prosecutors of derivative suits although no judgment has been obtained if they show substantial benefit to the corporation through their efforts . . . but there should be some check on derivative actions lest they be purely strike suits of great nuisance and no affirmative good and hence it is ruled generally that the benefit to the corporation and the general body of shareholders must be substantial." [At page 540, emphasis ours]

The mere possibility of harm or prejudice to the defendant corporation is insufficient; it must be real and effective ". . .it must not be speculative (in) nature . . ." Schechtman v. Wolfson p. 540.

The rejection of a speculative benefit as a basis for awarding legal fees and expenses is reiterated

in Wechsler v. Southeastern Properties, Inc., (supra). There the Court denied plaintiff's application for fees and expenses in connection with a class action which alleged that a prospectus issued in connection with the sale of the defendant corporation's stock contained false and misleading statements and omissions. The basis of the denial was an supervening suit by New York Attorney General which resulted in a settlement and disposition of the claims of the class. The Court concluded that it was not the plaintiff's action that produced the effective result but that of the Attorney General. The plaintiff would not be awarded attorneys' fees, said the Court, notwithstanding its finding that plaintiff's action was instituted independently of the Attorney General, and that plaintiff's action might possibly have affected the outcome.

In analyzing whether the plaintiff's efforts here produced a substantial benefit to the corporation sufficient to warrant an award of fees and expenses, it is necessary to focus on all of the plaintiff's claims including those respecting violations of the S.E.A. of 1934, lack of consideration for the granting of the amended option rights, unjust enrichment of directors and other optionees and the like, all of which were rejected by the District Court. The only issue decided favorably

to plaintiff was the narrow one as to whether the 1968 Plan by its terms contemplated the granting of the amended option rights. It should be apparent that attorneys' fees and expenses may not be awarded absent the production of a substantial benefit correcting or preventing a real harm or prejudice.

The cancellation of illegally issued stock in Mencher v. Sachs, 164 A. 2d 320 (Del. 1960) and McDonnell Douglas Corp. v. Palley, 310 A. 2d 635 (Del. 1973) cited in plaintiff's brief, whether it stems directly from Court determination or by action of the corporate defendant following plaintiff's suit clearly results in a substantial benefit to the corporation. An invalid or illegal issuance of stock works harm and prejudice to the corporation and its shareholders if, for no other reason than the dillution of equity. Likewise, the cancellation of options granted for an illegal or inadequate consideration as in Holthusen v. Edward G. Budd Mfg. Co., 55 F. Supp. 945 (E.D. Pa. 1944) corrects a real harm by preventing the waste of corporate assets and is in fact a substantial benefit.

Here, the District Court totally rejected plaintiff's claim that the amended rights had been granted for an inadequate consideration. The sole basis for the Court's determination was the finding based upon a construction of the language of the Plan, that the

Plan did not contemplate the granting of tandem or consecutive options. It is clear that the decision turned on this narrow issue alone. Had the Plan unambiguously authorized the granting of tandem or consecutive options, the Court's determination would have been adverse to the plaintiff. The consideration for the granting of the options, i.e. the incentive to key employees of the defendant corporation was found, by the District Court, to be totally adequate.

Similarly, the Court in Abrams v. Textile Realty Corporation, 97 N.Y.S. 2d 492 (Sup. Ct. 1949) also cited in plaintiff's brief - - resulted in the prevention of an ultra vires act involving the granting by the corporation of a mortgage on certain of its real property.

Each of the tainted transactions in the cases cited above by plaintiff involved the prospect of real, and not speculative harm or prejudice to the defendant corporation, which plaintiff's suit prevented. Here, the facts demonstrate that no harm or prejudice could possibly have resulted to Vornado or its shareholders.

The nexus of all of the decisional law involving the granting of fees and expenses in derivative suits is that there be a substantial benefit, preventing or correcting a real, not a speculative harm or prejudice to the defendant corporation. The plaintiff has not

shown this to be the case here.

POINT II

ATTORNEYS FEES SHOULD BE DENIED PLAINTIFF BECAUSE THE VERY TECHNICAL VIOLATION FOUND BY THE COURT TO HAVE BEEN COMMITTED BY DEFENDANTS RESULTED IN NO HARM OR LOSS TO THE CORPORATION OR ITS SHAREHOLDERS.

The substantive decision of the District Court as to whether the amended option rights were properly granted depended on the construction of two paragraphs of the Vornado Stock Option Plan, viz, paragraphs "2" and "8". Even more narrowly, the entire decision turned upon the construction of a single word, viz, "exercisable". Paragraph 8 of the Vornado Stock Option Plan contained a provision that any option granted shall not be "exercisable" while any options previously granted to purchase the same stock at a higher price remained outstanding. Defendants argued that this provision, and specifically the word "exercisable", contemplated, because of the prospective tenor of that word, the issuance of options while prior options exercisable at a higher price remained outstanding, so long as the second options were not actually exercised. Though the District Court rejected this argument, its decision

was based solely on a construction of the language of the Vornado Plan and a determination that the provisions therein did not contemplate the granting of amended option rights. Similarly, the decision of Judge Ryan in Waltzer v. Billera, supra, was based on this narrow and technical interpretation of U.S.I. Plan.

Garwin v. Cox, 72 Civ.1220 (S.D.N.Y.1974) is a case on all fours with the present action. It involved a complaint virtually identical to the one here. Judge Metzner, in granting defendant's motion for summary judgment as to the allegations in the complaint respecting violations of S.E.A. of 1934, held:

> "In short, the decision here to grant alternate options was nothing more than a routine management decision intended to deal with employee compensation." [emphasis ours]

In sum, every authority dealing with a suit involving amended option rights under a "qualified" Stock Option Plan determined that such a violation, if it existed, was based upon a narrow and technical construction of the terms of the Stock Option Plan involved; that there was no fraud, material misstatement or omission of fact; and that, in fact, the action involved nothing more than a routine management decision to effectuate incentive employee compensation for the benefit of the corporation respecting which action was taken. If plaintiff's suit produced anything at all, it

was nothing more than the correction of a purely technical violation which, had it remained uncorrected, would have produced no harm or prejudice to the defendant corporation.

POINT III

ATTORNEYS FEES SHOULD BE DENIED BECAUSE THE SECURITIES EXCHANGE ACT VIOLATIONS ALLEGED IN PLAINTIFF'S COMPLAINT WERE DISMISSED AND THE REMAINING ISSUE DECIDED BY THE DISTRICT COURT WAS NEITHER NOVEL OR COMPLEX AND RESULTED IN NO PECUNIARY OR OTHER BENEFIT TO THE DEFENDANT CORPORATION OR ITS SHAREHOLDERS.

At the outset, it is essential to underscore that the action herein sets forth numerous claims and allegations of violations of law in connection with the granting of the amended option rights, including violations of Sections 10 (b) and 14 of the Securities Exchange Act of 1934 and that, of all these claims, only the single narrow one of the technical construction of the language of the Stock Option Plan was determined by the Court to have merit. There was not one scintilla of evidence offered by plaintiff in support of her claims of violations of the Securities Exchange Act of 1934, nor in support of any of the other claims which were

ultimately rejected by the Court. These claims were at best, frivolous. Nowhere is the amount of the efforts of plaintiff's counsel that were devoted to the claim under the Securities Exchange Act of 1934 or, for that matter, the claim of the lack of consideration, delineated. In fact, if the action itself had any complexity, it involved the Securities Exchange Act claims--the construction of the Plan being purely a matter of "contractual" interpretation. In a real sense, the only issue litigated in this lawsuit was the claimed violations of the Securities Exchange Act of 1934 which the Court dismissed.

It is submitted that the bulk of the efforts of plaintiff's attorneys, as well as the entire efforts of plaintiff's accountant were devoted to this issue. As a result of the interposition by plaintiff of her claim of defendants' violation of the Securities Exchange Act of 1934, and the claim of inadequate consideration, the corporation was compelled to undergo the burden and expense of this lawsuit and the attendant cloud that it cast upon the propriety of the granting of the amended option rights.

Even the "novelty" of the theory offered by plaintiff in this action is cast in doubt by virtue of the rejection by the Court of all claims, save the narrow interpretive one of the Stock Option Plan. As previously

pointed out, the complaint here is a virtual carbon copy of complaints filed in prior suits of Garwin v. Cox and Waltzer v. Billera. In view of the foregoing, it is respectfully submitted that Judge Ryan's decision in Waltzer v. Billera rejecting legal fees, accounting fees and other expenses was entirely appropriate and exactly apposite to the action at bar.

Clearly, as is pointed out in Waltzer v. Billera, the services of an accountant is not justifiable. The only claim respecting which plaintiff was ultimately successful--the determination of the Plan did not warrant accounting services. The accounting submitted by defendants with respect to the granting and cancellation of the amended option rights did not require the services of an accountant; it was a straightforward matter of addition and subtraction. The bulk of the accounting itself was nothing more than a series of form-type cancellation agreements.

Plaintiff, in attempting to justify an award of counsel fees, seeks to find violations where there are none; complexity where there is only simplicity; uniqueness from repetition; the making of law when there is nothing more than a technical violation; and ulitmately a substantial benefit to the corporation from an academic lawsuit resulting finally in the cancellation, by agreement of the defendants, of amended option rights, the real

value of which, in the face of the market conditions of the stock, was meaningless. It is respectfully urged that the rationale of Waltzer v. Billera and the authority on which it relied in denying the award of attorneys' fees and expenses be applied to the instant action since there has been no showing of substantial benefit to the corporation and no demonstration of harm prevented by plaintiff's suit.

CONCLUSION

It is respectfully submitted that the District Court's approval of any attorneys' fees and expenses to plaintiff was in error and should be reversed.

Respectfully submitted,

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Attorney for Defendants-
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450 Park Avenue
New York, New York

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTHER JACOBY,
Plaintiff- Appellee- Appellant,

- against -

ALFRED B. AVERALL etal.,
Defendants-Appellants- Appellees,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 West 146th Street, New York, New York

That on the 19th *day of* May *19* 76 *at* 1501 Broadway, New York, New York

deponent served the annexed Brief *upon* Garwin & Bongaft *the* Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.*

Sworn to before me, this 19th *day of* May *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele

JAMES A. STEELE